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No. 00-540

Supreme Court, U.S.
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In The

# Supreme Court of the United States

NEW YORK UNIVERSITY,

*Petitioner,*

v.

SUSAN ROGERS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF IN OPPOSITION

JAMES A. BROWN, ESQ.
*Counsel of Record*
*Attorney for Respondent*
30 Vesey Street, 6th Floor
New York, N.Y. 10007
(212) 587-4151

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## REASONS FOR DENYING THE WRIT

The legal question raised by petitioner's writ is whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, requires respondent's statutory employment claims to be arbitrated based on the provisions contained in petitioner's collective bargaining agreement. Petitioner, after presenting some of this Court's decisions regarding the Federal Arbitration Act, concludes, in part, that granting the petition will permit this Court to "harmonize this area of the law with the Court's arbitration jurisprudence." Pet. Brief at 8.[1] Petitioner also argues that the contractual language in its collective bargaining agreement provides the predicate for this Court to essentially reverse the long-standing doctrine set forth in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). Pet. Brief at 5.

Petitioner's writ should be denied for three reasons: (1) the Court below did not address the Federal Arbitration Act; (2) the actual language of petitioner's collective bargaining agreement contains, as the Court below found, an insufficient waiver based on the legal standard set forth in *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70 (1998); and (3) there is no significant split among the circuits regarding the continuing effect of the *Gardner-Denver* doctrine by which waivers contained in collective bargaining agreements are considered by a different legal standard from those contained in individual employment contracts.

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[1] All references to petitioner's brief are indicated by "Pet. Brief at ___" and to petitioner's appendix by "Pet. App. ___", with the page number(s) inserted.

## I

## THE DECISION BELOW DOES NOT ADDRESS THE QUESTION RAISED BY THE PETITION REGARDING THE FEDERAL ARBITRATION ACT

The Court below essentially divided its analysis into two sections. First, the Court below examined the continuing vitality of *Gardner-Denver, supra,* within the Second Circuit and also in other circuits. Next, the Court considered whether the alleged waiver in petitioner's collective bargaining agreement was "clear and unmistakable" within the meaning of *Wright, supra.* Nowhere did the Court below engage in any analysis regarding the Federal Arbitration Act. In fact, the Court below makes no reference to the Federal Arbitration Act except to acknowledge that petitioner had originally filed its motion to stay the judicial proceeding and compel arbitration pursuant to said Act. Pet. App. 3a.

## II

## THE COLLECTIVE BARGAINING AGREEMENT CONTAINS NO "CLEAR AND UNMISTAKABLE" WAIVER WITHIN THE MEANING OF *WRIGHT*

The Court below concluded that petitioner's collective bargaining agreement with respondent's former labor union fails to contain any explicit waiver of respondent's right to file her anti-discrimination and Family and Medical Leave Act ("FMLA") claims in court. Employing the analysis contained in *Wright,* the Court below first examined the collective bargaining agreement's arbitration clause and then the agreement's references to the specific statutes in question.

As observed by the Court below, the collective bargaining agreement contains only a general arbitration clause which covers "any dispute concerning the interpretation, application, or claimed violation of a specific term or provision of this Agreement." Pet. App. 6a. The Court below, relying on *Wright* and some of its progeny, concluded that such a "broad and general" arbitration clause failed to serve as an explicit waiver: "The degree of generality falls *far short* of a specific agreement to submit all claims to arbitration." Pet. App. 6a (emphasis added).

The collective bargaining agreement's anti-discrimination provision is also nonspecific. Said provision provides: "There shall be no discrimination as defined by applicable Federal, New York State and New York City Laws. . . . " Pet. App. 2a. Again employing this Court's *Wright* analysis, the Court below observed that the labor agreement's general reference to anti-discrimination did not evince an explicit incorporation of said anti-discrimination provision into the agreement that would make it "subject to the arbitration clause." Pet. App. 7a.

In addition, the collective bargaining agreement's "leave of absence" provision only makes reference to the FMLA and states that employees are entitled to certain rights under the FMLA. Pet. App. 18a. The Court below stated that this reference to the FMLA does not "specifically make compliance with the FMLA a contractual commitment which is subject to the arbitration clause". Pet. App. 7a. The Court below cited *Wright* for the proposition that a collective bargaining agreement's mere reference to such laws only " 'creat[es] a contractual right that is coextensive with the federal statutory right' " and that creation of coextensive rights " 'is not the same as making

compliance with the [federal statute] a contractual commitment that would be subject to the arbitration clause.' " Pet. App. 7a, *quoting from, Wright*, 525 U.S. at 79 and 81.

Thus the Court below employed this Court's *Wright* analysis regarding the adequacy of the alleged waiver in petitioner's collective bargaining agreement. Based on *Wright*'s direction that any such waiver be "explicit", the Court below concluded that the arbitration clause herein fell "far short" of this Court's standard. The Court below also found that the collective bargaining agreement's references to anti-discrimination failed to incorporate any such laws into the agreement and that its reference to the FMLA merely created a contractual, "co-extensive" right, and that such statutory references did not satisfy *Wright*'s "clear and unmistakable" standard for committing such provisions to arbitration.

## III

## NO SIGNIFICANT SPLIT IN THE CIRCUITS EXISTS REGARDING THE APPLICATION OF THE *GARDNER-DENVER* DOCTRINE

*Gardner-Denver*, which addresses whether a collective bargaining agreement may waive a union member's right to file her statutory employment claims in court, has remained "good law" for twenty-six years. When this Court decided in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) that individual employment contracts could waive an employee's right to file statutory employment claims in federal court, virtually all courts thereafter distinguished *Gardner-Denver* from *Gilmer* by contrasting collective bargaining agreements and individual employment contracts. The Court below observed that the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) has stood alone

in blurring this distinction between waivers contained in these two types of employment contracts. Pet. App. 4a. Petitioner too acknowledges that only the Fourth Circuit has rejected the prevailing view that a waiver contained in a collective bargaining agreement should be treated differently from one contained in an individual employment contract. Pet. Brief at 8.[2]

The decision reached by the Court below, regarding the alleged waiver of a judicial forum contained in petitioner's collective bargaining agreement, is consistent with the nearly unanimous view among the circuits which is rooted in the *Gardner-Denver* doctrine. The Second Circuit's decision is not in conflict with virtually any other circuit.

## CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

JAMES A. BROWN, ESQ.
*Attorney for Respondent*
30 Vesey Street, 6th Floor
New York, N.Y. 10007
(212) 587-4151

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[2] Even the Fourth Circuit – post-*Wright* – has retreated from the seemingly absolute position it advanced in *Austin, supra,* that waivers contained in collective bargaining agreements are enforceable to require arbitration of a union member's statutory anti-discrimination claims. *See Carson v. Giant Food, Inc.,* 175 F.3d 325, 331 (4th Cir. 1999) and *Brown v. ABF Freight Systems Inc.,* 183 F.3d 319, 321 (4th Cir. 1999) (in which the Fourth Circuit adopted *Wright*'s "clear and unmistakable" standard for such waivers).